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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 824.

BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, a Minor, and MARY ANN ELLIOTT, a Minor, *Petitioners*,

vs.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, A CORPORATION, and FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, a Minor, and MARY ANN ELLIOTT, a Minor, *Petitioners,*

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THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, A CORPORATION, and FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners herein seek review by this Court of an opinion and judgment entered by the United States Circuit Court of Appeals for the Tenth Circuit in the case of Barbara Ann Elliott, Clifford Elliott, Ruby Mae Elliott, a minor, and Mary Ann Elliott, a minor, Appellants, vs. The Metropolitan Casualty Insurance Company of New York, a corporation, and Firemen's Insurance Company of Newark, New Jersey, a corporation, Appellees, Number 5590, F. 2d .

STATEMENT OF JURISDICTION.

The judgment and opinion aforesaid was rendered by the Circuit Court of Appeals for the Tenth Circuit on December 2, 1957. Jurisdiction is vested in this Court to review said opinion and judgment by Writ of Certiorari by the provisions of Title 28, Section 2101, U.S.C.A.

QUESTIONS PRESENTED FOR REVIEW.

The case presented to the Court of Appeals was one involving the right of the Metropolitan Casualty Insurance Company and Firemen's Insurance Company to escape their obligation, as liability insurers of one Herman E. Johnston, to defend certain personal injury actions brought against him by members of the Elliott family growing out of an automobile collision, or to pay any judgments which the Elliotts might obtain from Johnston.

The insurance companies brought a declaratory judgment action in the United States District Court for the District of Kansas to obtain a judgment relieving them of all responsibility under their policy of insurance on the theory of "non-cooperation" of Johnston, their insured.

The District Court entered a summary judgment in favor of the insurance companies, from which judgment the Elliotts appealed to the Tenth Circuit Court of Appeals. It was the contention of the Elliotts in the District Court as well as in the Court of Appeals that in order for the insurance companies to prevail, it was incumbent on them to establish: (1) a material breach by Johnston of the "cooperation clause" of his policy, and (2) prejudice to the insurance companies in the defense of the Elliotts'

actions against Johnston resulting from Johnston's "non-cooperation." It was the further contention of the Elliotts that there was no substantial evidence in the case either that Johnston materially breached his duty under the terms of his policy, or that the insurance companies were prejudiced by his conduct in the defense of the Elliotts' claims.

The Court of Appeals in a divided opinion affirmed the District Court. The majority opinion held in effect that there was no necessity of a showing of prejudice by the insurance companies in order for them to avoid their policy obligations. The dissenting opinion adhered to the rule that a showing of prejudice was essential in order for the insurers to prevail, and the dissenting Judge saying in his opinion that the record disclosed no substantial evidence of prejudice, held that the judgment of the trial court should have been reversed.

The questions presented for review by this Court are: (1) whether the majority opinion and judgment of the Tenth Circuit Court of Appeals, relieving the insurance companies of their obligation to defend their insured on a basis of the insured's alleged non-cooperation, in absence of substantial evidence of prejudice to the insurance companies, is in error and in conflict, not only with other circuit court decisions on the subject, but in conflict with its own prior decisions on the matter.

(2) Whether the majority opinion of the Court of Appeals is in error and in conflict with the applicable law of the State of Kansas.

STATEMENT OF THE CASE.

The case of Metropolitan Casualty Insurance Company of New York, a corporation, and Firemen's Insurance Company of Newark, New Jersey, a corporation, plaintiffs, vs. Anna Mae Johnston, Herman E. Johnston, Barbara Ann Elliott, Clifford Elliott, Ruby Mae Elliott, a minor, and Mary Ann Elliott, a minor, defendants, was commenced in the United States District Court for the District of Kansas, at Kansas City, by the filing of plaintiffs' (the insurance companies') complaint for a declaratory judgment for the purpose of procuring an adjudication as to the coverage of a combination policy of insurance issued by the Metropolitan Insurance Company of New York and the Firemen's Insurance Company of Newark, New Jersey, to Anna Mae Johnston on February 15, 1952. Jurisdiction in that case was properly vested in the United States District Court for the District of Kansas on the basis of diversity of citizenship of the parties. The plaintiffs' complaint was bottomed on the theory that the insured breached the cooperation clause of the insurance policy, and was for that reason not entitled to coverage. The Complaint (T. 2-15) alleged the issuance of a liability insurance policy by the insurance companies aforesaid, insuring a 1949 Cadillac automobile owned by Anna Mae Johnston, and alleged that on February 11, 1953, one Herman E. Johnston was operating said automobile on U. S. Highway 69 near Arma, Kansas, at which time said automobile collided with the vehicle operated by defendant, Clifford Elliott, in which automobile the other defendants Elliott were riding as passengers. The Complaint alleged that thereafter, on or about June 30, 1954, six actions at law were filed by the Elliott family in the Circuit Court of Vernon

County, Missouri, which actions were tort actions claiming damages to the plaintiffs therein (Elliotts) for alleged injuries growing out of said collision. The Complaint alleged that the defendant, Herman E. Johnston, wrongfully entered into a conspiracy with and acted in wrongful collusion with the defendants, Clifford Elliott, Barbara Ann Elliott, Ruby Mae Elliott, Mary Ann Elliott, and their respective agents and attorneys, in order to permit the Circuit Court of Vernon County, Missouri, to obtain ostensible personal jurisdiction of the said Herman E. Johnston, all in order to obtain some sort of improper, unfair and unjust advantage to the defendants—the Elliott family in prosecuting their actions in the State of Missouri, rather than in the State of Kansas, where such actions would normally and properly have been brought, all of such conduct being in violation of the provisions of the policy of insurance and in derogation of the rights of the plaintiffs herein under the rights of insurance. The Complaint further alleged that thereafter, the insurance companies' attorneys moved to quash the purported service of process in the Missouri actions, which motion was sustained in the Circuit Court of Vernon County, Missouri. The Complaint further alleged that thereafter on February 10, 1955, the defendants, Clifford Elliott and Barbara Ann Elliott, filed an action against the said Herman E. Johnston in the District Court of Crawford County, Kansas, at Pittsburg, and that the defendant, Herman E. Johnston, a resident of Bourbon County, Kansas, acting in violation of the provisions of the policy here involved, wrongfully and collusively entered Crawford County, Kansas, so that ostensible service of process might be had upon him by the Sheriff of Crawford County, all to serve the advantage of the defendants, Clifford Elliott and Barbara Ann Elliott. The Complaint further alleged that Herman E. Johnston concealed and misrepresented certain material facts concern-

ing the accident, and the circumstances concerning the service of process on him in the suits filed in Vernon County, Missouri, and in Crawford County, Kansas. The Complaint further alleged that there was no liability or obligation on the part of appellees to defend the actions at law in the District Court of Crawford County, Kansas, or to pay any sum whatsoever on behalf of Herman E. Johnston, or Anna Mae Johnston, to the Elliotts because of the injuries sustained in the collision aforesaid, and the Complaint then prayed for an adjudication and declaration that the Metropolitan Casualty Insurance Company of New York and the Firemen's Insurance Company of Newark, New Jersey, were neither obligated to defend the actions brought by the Elliotts, or to pay any sum which the Johnstons or either of them might be obligated to pay by reason of their liability for the damages allegedly sustained by the Elliotts.

The defendants Elliott duly answered (T. 16). The defendants Johnston failed to answer or otherwise plead, and were in default. Thereafter, plaintiffs (the insurance companies) moved for summary judgment (T. 17) in accordance with their Complaint, and the defendants, Elliott, also moved for summary judgment (T. 23).

The evidence in support of the insurance companies' Motion for Summary Judgment may be summarized as follows:

At the time of the collision in question, Herman E. Johnston was a resident of Fort Scott, Bourbon County, Kansas, where he was employed as custodian of the VFW Club, but actually made his living gambling (T. 27-28). On February 11, 1953, said Herman Johnston was driving an automobile northward on U. S. Highway 69, approximately six miles north of Arma, Kansas, at which point

he passed a truck in a "no-passing" zone, and had a head-on collision on his wrong side of the road, colliding with the vehicle in which the Elliott family was traveling. He was charged with reckless driving on a complaint filed by John Monahan, Captain of the Kansas State Highway Patrol, and was found guilty by J. Olin Biggs, Judge of the City Court of Pittsburg, Crawford County, Kansas (T. 26). On May 4, 1953, the Elliott family retained Pete Farabi, an attorney of Pittsburg, Kansas, to represent them in civil actions for damages which they sustained in said collision (T. 25). Thereafter, during the summer of 1954, Mr. Farabi went to Herman Johnston's home and asked Johnston if he wanted to be tried in Kansas or Missouri, to which Johnston replied he would rather be tried in Missouri. Johnston's reason for preferring to be tried in Missouri was on account of his occupation—that is, on account of his gambling (T. 30-31). *He felt that he would have a better chance in Missouri* than in Fort Scott (T. 31). Mr. Farabi did not suggest to Johnston that he (Farabi) would like to have the case tried in Missouri (T. 31), Johnston knew that Farabi preferred to sue him in Missouri (T. 33), but he did not know why. Farabi did not tell him why (T. 31, 34). About a month or two months later, Johnston went to Nevada, Missouri, and submitted himself to service of process there (T. 31).

Following service of process on Johnston in the actions filed in Vernon County, Missouri, attorneys for the insurance companies filed motions to quash the service. The Circuit Court of Vernon County sustained the motions and dismissed the actions.

While the actions were pending in Vernon County, Missouri, and before the Circuit Court there dismissed said actions, Barbara Ann Elliott and Clifford Elliott filed actions against the said Herman E. Johnston in the Dis-

trict Court of Crawford County, Kansas. Service was obtained in said actions in Crawford County, Kansas. Thereafter, while the insurance companies' declaratory judgment action was pending in the Federal District Court, and before judgment was entered, the above mentioned cases pending in the District Court of Crawford County, Kansas (State Court), were voluntarily dismissed by the plaintiffs therein, so at the time when the United States District Court sustained the insurance companies' Motion for Summary Judgment in the declaratory judgment action, there were no actions pending either in Crawford County, Kansas, or anywhere in Missouri, growing out of the collision in question.

With respect to the service of process on Johnston in the Crawford County actions, Johnston testified that he went to Crawford County to see a fellow who owed him some money, and while there he was served with the papers (T. 35). He didn't know why these suits were filed and service obtained on him in Crawford County instead of Bourbon County. He didn't know what difference there would be between the two counties (T. 36), but Johnston, because of his occupation, would prefer to be sued in Crawford County (T. 36).

During the course of his testimony in the declaratory judgment action, Johnston testified that in an earlier statement on July 8, 1954, he lied to a Mr. Palmer, a representative of the insurance companies, with reference to certain questions concerning the service of process on him at Nevada, Missouri (T. 37-43).

Johnston also testified in the declaratory judgment action, after the dismissal of the actions in Vernon County, Missouri, that it was still his opinion, in view of the local situation, that both his interest and his insurer's interest would be better served and would receive better results

in Missouri or Crawford County, Kansas, than in Bourbon County (T. 44).

On the basis of the facts as above set forth, the United States District Court sustained the plaintiff insurance companies' motion for summary judgment, and overruled the motion for summary judgment filed by the defendants Elliott, holding, in effect, that the insurance companies were not obligated under their policy of insurance to defend any actions brought by the Elliotts against Johnston, and holding that the insurance companies were under no obligation to pay any judgments which the Elliotts might obtain against Johnston.

Thereafter, the defendants, Elliott, duly appealed to the United States Court of Appeals for the Tenth Circuit, which Court upon hearing arguments in the case, and considering the same, entered its opinion and judgment, review of which is sought in this Court. A copy of the opinion of the United States Court of Appeals is appended hereto.

It will be noted that the case was heard and decided in the Court of Appeals by Judges Murrah, Lewis and Pickett. The Court was divided in its opinion. The majority opinion written by Judge Lewis and concurred in by Judge Murrah, affirmed the action of the trial court in sustaining the insurance companies' motion for summary judgment, but Judge Pickett, in a strong dissenting opinion, disagreed with the majority of the Court, being of the view that the insurance companies should be liable under the terms of their policy to defend the Elliotts' actions against Johnston, and to pay any judgments which the Elliotts might obtain in such actions.

ARGUMENT.

An insurance company seeking to escape its obligations on a policy of liability insurance on a basis of non-cooperation of the insured must establish (1) a material breach of the cooperation clause of the policy by the insured, and (2) prejudice to the insurer in the defense of an action against the insured resulting from the insured's non-cooperation. *State Farm Mutual Automobile Insurance Company* v. *Koval*, (10th Cir.) 146 F. 2d 118; *Levy* v. *Indemnity Insurance Company of North America*, La. App., 8 So. 2d 774; *Associated Indemnity Company* v. *Davis*, C.C.A. N.C., 104 F. 2d 730; *Riggs* v. *New Jersey Fidelity & Plate Glass Co. of Newark, N. J.*, 126 Ore. 404, 270 Pac. 479; *Norwich Union Indemnity Company* v. *Haas*, C.C.A. Ill., 179 F. 2d 827; *Jamison* v. *Farmers Mutual Automobile Insurance Co.*, 181 Kan. 100, 309 P. 2d 394; *Blashfield Cyclopedia of Automobile Law & Practice*, Vol. 6, Part 2, page 78.

Long prior to its decision of the instant case, the Tenth Circuit Court of Appeals, in *State Farm Mutual Insurance Company* v. *Koval*, *supra*, stated the aforesaid rule in the following words:

> "Under the weight of authority, to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer; whether there has been such a breach is a question of fact; and such a breach is an affirmative defense, the burden of establishing which rests on the insurer." (l.c. 120).

That this rule likewise prevails in the State of Kansas is demonstrated by the language of the Kansas Su-

preme Court in *Jamison* v. *Farmers Mutual Automobile Insurance Company, supra,* where considering non-cooperation of the insured as a means of escape for a liability insurance carrier, the Court said the insurer must "show substantial prejudice to the insurer in defending an action, * * *." (309 P. 2d l.c. 400).

Petitioners contend, as they did in both the District Court and in the Court of Appeals, that the record discloses no substantial evidence either of material non-cooperation by Johnston, or of prejudice to the insurer.

The insurers' claim of non-cooperation of their insured was based on the following conduct of the insured: (1) his action in submitting himself to service of process in the suits filed against him by the Elliotts in Vernon County, Missouri; (2) his being served with process in Crawford County, Kansas, in the two actions brought against him there by Clifford Elliott and Barbara Ann Elliott; (3) his action in giving false information to a representative of the insurance companies relative to the circumstances surrounding the service of process on him in the actions in Vernon County, Missouri.

We submit that the facts and circumstances in this case do not warrant a Declaratory Judgment in favor of the insurance companies, or Summary Judgment in their favor as ordered by the Trial Court, and as held by the Court of Appeals, on any of the theories aforesaid. The record in this case, when considered in its entirety, does not establish a material breach by defendant Johnston of the cooperation clause of his insurance policy.

The respective claims of the Elliotts against Johnston arose out of an automobile collision between an automobile operated by Johnston and an automobile occupied by the Elliotts. The collision occurred on February 11, 1953,

on U. S. Highway No. 69 approximately six miles north of the City of Arma, in Crawford County, Kansas. The Elliotts are residents of Crawford County, Kansas. The defendant Johnston is a resident of Bourbon County, Kansas. There is no suggestion that the Elliotts are related to Johnston or that any relationship exists between them which would be likely to create or encourage any fraudulent or collusive action between them. Apparently they are total strangers. The collision was a head-on collision, resulting from gross and aggravated negligence on the part of the defendant Johnston in crossing over a yellow line to pass a vehicle in a no-passing zone (T. 25, 26). There is no defense that can be seriously presented in opposition to plaintiffs' claims against the defendant Johnston, whether said claims are tried in Bourbon County, Kansas, Crawford County, Kansas, or Vernon County, Missouri, or in any other Court.

There is no intimation anywhere in the record that the plaintiff insurance company was in any way misled or furnished any false information during its investigation of the claim. It can be assumed that it had full notice of the claims and the seriousness thereof very shortly after the accident occurred. The Elliotts did not employ counsel until on or about May 4, 1953 (T. 25). So the insurer had almost three months to evaluate and attempt to settle the claims before counsel was employed by the Elliotts. Mr. Pete Farabi, an attorney of Pittsburg, Kansas, after being employed by the Elliotts, and during the summer of 1954, called on Mr. Johnston at Johnston's home (T. 30). On that visit, Mr. Farabi told Johnston he was going to sue him, and that he would rather sue him in Missouri than in Kansas (T. 67). Johnston did not know why Farabi preferred to sue him in Missouri, but Johnston felt that any place except Fort Scott would be better for

him (T. 30, 31). Accordingly, he went to Nevada, Missouri, and was served.

Nowhere does it appear that the insurance company or any of its representatives had ever instructed Johnston prior to his talking with Mr. Farabi, that he should not talk with Mr. Farabi, and nowhere does it appear that the insurance company or any of its representatives prior to the date of Johnston's being served in Vernon County, Missouri, had ever instructed him to stay away from Vernon County, Missouri, or to avoid being served anywhere outside of Bourbon County, Kansas. It does appear affirmatively that Johnston operates, and did at all times relevant to this action operate, a club at Fort Scott, Kansas, and his business, as he frankly stated in his deposition, is that of a professional gambler (T. 27, 28). It is quite evident that a man engaged in such a business might have very good reason for wanting to be sued some place besides in his home town, and certainly it cannot be inferred that his action in going to Vernon County, Missouri, where he was served with process, even if ~~it be assumed~~ that he went there for that purpose, was a collusive act done for the purpose and with the intention of aiding the Elliotts or giving them some advantage, and in derogation of the rights of the insurance company. His testimony is exactly to the contrary.

Nowhere does the policy of insurance forbid the insured from so maneuvering as to secure a trial in a venue of his choice. It hardly seems fair or just therefore, to permit the insurance company to escape its obligation to defend the Elliotts' actions against Johnston or to pay any judgments which the Elliotts might some day recover against Johnston, simply because Johnston accepted service of process in Vernon County, Missouri, a venue which, according to his testimony, he regarded as being more

favorable to himself than Bourbon County, the county of his residence. Such is true, particularly in absence of evidence of any instructions or warnings on the part of the insurance company to Johnston, alerting him of their wishes in the matter.

It has been held that a waiver of service of process and a voluntary entrance of appearance by an insured in an action against him does not constitute a violation of a policy provision requiring cooperation of the insured. See *Ohio Casualty Insurance Company* v. *Beckman*, Circuit Court of Appeals, 5th Circuit, 74 F. 2d 75. We submit that if a voluntary entry of appearance in an action instituted against an insured does not constitute a material breach of the cooperation clause of the policy, then certainly the voluntary acceptance of service such as we have in our case would not constitute such a breach.

What has been stated above with reference to Johnston's submitting to service of process in Vernon County, Missouri, is likewise applicable to his action in submitting to service in Crawford County, Kansas. Further, with respect to the service on Johnston in Crawford County, the testimony precludes any inference that he voluntarily submitted himself to service there (T. 35, 36).

The only remaining question to consider, then in determining whether the defendant, Johnston, violated the cooperation clause of his insurance policy is that of his having made false statements to the insurance company's investigator, Palmer, with reference to the service of process which was obtained upon him in Vernon County, Missouri. We submit that inasmuch as his conduct in submitting to service in absence of a policy provision forbidding his so doing, and in absence of instructions from a representative of his company to refrain from so doing, does not constitute a breach of his insurance policy, then any statements

which he may have made with reference thereto would be immaterial, and any alleged misstatements in connection with an investigation regarding the service would not constitute a material breach of his policy.

Further, even if Johnston's conduct could be considered a material breach of the cooperation clause of his insurance policy, such conduct would not be sufficient to permit the insurance companies to avoid liability in absence of a showing of prejudice to them in the defense of the Elliotts' actions against Johnston. The record in the case wholly fails to show such prejudice.

Let us consider each act of Johnston complained of by the insurance companies, and see the effect thereof on the defense of the Elliotts' claims.

1. Johnston's action in submitting to service in Vernon County, Missouri.

With respect to this, it is sufficient to say that the suits filed in Vernon County were all dismissed by the Court, and can never be refiled there so that nothing about that proceeding can be prejudicial to the insurance companies. Further, it certainly does not appear as a matter of law that Johnston, by submitting to service there, was acting in bad faith. His testimony shows that he thought he would do better in a trial there than in Kansas, and in absence of instructions from his insurer, was doing what he thought best for him and the company.

2. Johnston's action in being served in Crawford County, Kansas.

What has been said above relative to the Vernon County actions applies equally to the Crawford County actions. Those actions have also been dismissed and are no longer pending. The fact that they were once filed

and service obtained on Johnston can in no way prejudice the insurance companies. Further, it does not appear as a matter of law that Johnston voluntarily made himself available in Crawford County to be served. His testimony is to the contrary.

3. Johnston's false statements to the insurance companies' investigator.

The only false statements charged related solely to the matter of service of process in Missouri. They in no way pertained to the circumstances of the accident and can in no way affect or impair plaintiffs' defense of any actions that will be brought against Johnston in Kansas. Since the Elliotts' actions will not be prosecuted in Missouri, any statements made by Johnston pertaining to the service on him in Missouri, or the events leading up to same are neither material nor prejudicial to plaintiffs' defense of the Elliotts' claims.

Nowhere is there any proof or even suggestion that Johnston has failed to fully or truthfully state to plaintiffs' representatives the facts concerning the accident. Nowhere is there any proof that the Elliotts' claims are fraudulent or unjust or that Johnston is conspiring with the Elliotts or their attorneys in any way to further the prosecution of a fraudulent, unjust or doubtful claim.

Irrespective of the actions filed in Vernon County and Crawford County, and irrespective of statements made by Johnston relative thereto, the Elliotts' actions will now have to be prosecuted in Bourbon County, Kansas—the insurance companies' obvious choice—and they can there be fully defended by the insurance companies without any prejudice.

Judge Pickett in his dissenting opinion clearly points out the absence of any showing of prejudice to the insur-

ance companies in this case. In his dissent, he cites numerous authorities (including *Koval, supra,* decided by the Tenth Circuit Court) which held proof of prejudice to be an essential element of the insurer's case.

We submit that the majority opinion of the Court of Appeals constitutes a radical departure from well established rules governing the subject matter of this case. It conflicts with numerous holdings in other circuits, as well as with the Tenth Circuit Court's own earlier decision. Likewise, it conflicts with the law of Kansas as expressed by the Supreme Court of that State in *Jamison, supra.*

The language contained in Judge Pickett's dissent and the views therein expressed conform directly with the long established and uniform rules governing the question here involved. We respectfully suggest that his dissenting opinion should be the law of the case.

We seek review by certiorari in this case, not only because of the injury which has been done to the Elliott family by the results thus far achieved in this case, but for the further reason that if the rule established by the majority opinion in the Tenth Circuit Court of Appeals be allowed to stand, it will mean that hereafter, the slightest trivial act of so-called non-cooperation by an insured will constitute a gap through which liability insurance companies will be able to avoid their obligations to the public. In this day and time, when the automobile is in such widespread use, and when each year countless numbers of people are injured and killed on the highways, the question here presented is of grave public importance. It is our sincere trust that this Court will accept jurisdiction in this case and review the opinion of the Court below to the end not only that the Elliott family may eventually obtain substantial justice, but to the further end that the public may be protected from the development of a line of decisions

which will give to the insurance companies a great and undue advantage.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

November Term, 1957.

BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, a Minor, and MARY ANN ELLIOTT, a Minor,

Appellants,

vs.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation, and FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a Corporation,

Appellees.

No. 5590.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

(Filed United States Court of Appeals, Tenth Circuit, December 2, 1957. Robert B. Cartwright, Clerk.)

Edward V. Sweeney (Pete Farabi was with him on the brief) for Appellants.

Donald N. Clausen (Clausen, Hirsh & Miller and Donald C. Little and Bates & Little were with him on the brief) for Appellees.

Before Murrah, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

Appeal is taken from a judgment of the United States District Court for the District of Kansas,[1] summarily entered holding that appellees are relieved from any obligation under an automobile liability insurance policy because of the insured's breach of the cooperation clause of the insurance contract.[2] The judgment of the trial court was declaratory under Title 28, U.S.C.A. 2201, and diversity jurisdiction is admitted, 28 U.S.C.A. 1332(a).

The determinative facts are not in dispute. Herman E. Johnston, an insured under the subject policy, was the driver of an automobile involved in a collision with another automobile on February 11, 1953, in Crawford County, Kansas. Substantial claims were made by members of the Elliott family, residents of Crawford County and appellants herein, against Johnston as a result of the collision.

About three months after the accident, the Elliott family retained Pete Farabi,[3] an attorney practicing at Pittsburg, Crawford County, Kansas, to pursue their claims. Farabi contacted Johnston at the latter's home in Bourbon County, Kansas, and told Johnston that he intended to file suit in behalf of the Elliotts and that he preferred to do so in the courts of Missouri rather than

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[1]146 F. Supp. 5.

[2]"The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation nor incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

[3]Farabi appeared upon the brief filed in this court but did not argue the case. None of the conduct attributed to Farabi was participated in by Edward V. Sweeney, who presented the matter on appeal for appellants.

Kansas. Farabi gave Johnston no reason for such preference but later testified that he (Farabi) had had some "unhappy experiences" in trying cases in Bourbon County, the place of Johnston's residence. Johnston agreed to and did travel to Vernon County, Missouri, where he submitted to service of process in six separate actions filed in the state court. The appellee insurance companies, appearing for Johnston in the Missouri trial court under a reservation of rights agreement moved to quash service of process. The Missouri trial court upon its own motion quashed the service and found as a fact that:

> "Plaintiffs' Attorney Farabi, and defendant Johnston wrongfully and fraudulently conspired and colluded together to invoke the processes of this court and its writ of summons caused to be issued in this action by fraudulent acts of plaintiffs' attorney and defendant."

And that: "Plaintiffs, plaintiffs' attorney and defendant have not come into this court with clean hands. This court considers their action a legal fraud upon this court and upon the tax-paying citizens of Vernon County. This court cannot and will not accept jurisdiction of these suits under the circumstances present in these cases."

The trial court was affirmed on appeal to the Supreme Court of Missouri, *Elliott v. Johnston*, Mo. . 292 S.W. 2d 589.

Johnston's deposition has been twice taken. In the second of these he freely admits that the information which he had given the insurance company professing innocence of collusion in the circumstances surrounding the service of process in Missouri, was a "pack of lies" made, he asserts, because of a personal dislike of his interrogator. He does not now dispute that his presence in Missouri was by prearrangement with and at the suggestion of the attorney

Farabi. He asserts, however, that he believes a prejudice exists against him at his place of residence and that it would be to his own advantage to defend litigation at a place other than Bourbon County, Kansas.

Counsel for the Elliotts next obtained service of process against Johnston in Crawford County, Kansas. Although claim is made that this too was done by collusion and prearrangement, Johnston denies the claim. A genuine issue of fact is consequently raised and prevents consideration upon summary judgment of the occurrence beyond the fact of service. *Hunt* v. *Pick*, (10 Cir.) 240 F. 2d 782; *Broderick Wood Products Co.* v. *United States*, (10 Cir.) 195 F. 2d 433. These suits have been voluntarily dismissed and the actions have been refiled and process has been obtained upon Johnston in Bourbon County, Kansas. The actions are now pending.

From this factual background is presented the single question of whether or not Johnston's conduct has been such as to violate the cooperation clause of the insurance contract and thus allow the insurance company to refuse the responsibility of defense and avoid the possibility of indemnity liability. The Johnstons did not appear at trial and have not appealed. The appellants, having no rights against the insurance company except as derived through Johnston's contract, are limited by the conditions of the policy. If Johnston's acts were such as to bar him from the benefits of his policy, the appellants are likewise precluded, *State Farm Mutual Automobile Insurance Co.* v. *Bonucci*, (8 Cir.) 111 F. 2d 412.

As always, when unblessed events are the subject matter of a contract, cooperation between contracting parties is essential to fulfill the contemplated purpose of shifting the financial burden of loss within the terms of the agreement. The inherent nature of the subject matter

of automobile liability insurance necessitates the mutual obligation of cooperation between insured and insurer and clauses in insurance policies comparable to the one here under consideration have long been recognized as reasonable conditions necessary to protect the insurer against collusive claims, *American Automobile Insurance Co.* v. *Fidelity and Casualty Company of New York*, 159 Md. 631, 152 Atl. 523; *Watkins* v. *Watkins*, 210 Wis. 606, 245 N.W. 695, and prejudicial interference with the defense of any claim, *Kindervater* v. *Motorists Casualty Insurance Co.*, 120 N.J.L. 373, 199 Atl. 606. Since the elimination of connivance between the insured and claimant is a basic purpose of the cooperation clause, minor infractions by the insured do not materially threaten the insurer's rights even though lack of cooperation be affirmative in nature. Such situations include discrepancies in statements given by the insured to the company when bad faith is not apparent. *State Automobile Mutual Insurance Company of Columbus, Ohio*, v. *York et al.*, (4 Cir.) 104 F. 2d 730. And when reasonable minds may differ as to the intent of the insured in furnishing false information to the company the question of cooperation should be submitted to the trier of fact. *Standard Insurance Co.* v. *Readnour*, (10 Cir.) 241 F. 2d 14. But where deliberate misstatements are made by the insured which materially harm the company or aid the claimant the policy is voidable by the company. *State Farm Mutual Automobile Insurance Co.* v. *Bonacci*, *supra*, and *Commercial Standard Insurance Co.* v. *Readnour*, *supra*.

There can be no doubt that in the instant case Johnston's admitted "pack of lies" concerning his submission to Missouri process was both intended to mislead the appellee company and to further and aid his collusive understanding with the claimant's counsel. He had con-

sulted with opposing counsel, agreed to lend himself to that attorney's desires, did so, and then falsely testified concerning the arrangement in order to hide the collusion. Upon so clear a showing the insurance company is not bound to defend the case to completion and then show whereby the result would have been different with a co-operative witness. "Such conditions would be robbed of nearly all practical value if in applying them the question of the validity of the professed claim must be investigated. For the purpose of protecting the company against collusion in regard to fabricated or unfounded claims, it is necessary that the conditions should exclude the possibility of such conduct in connection with any claim of any character." *American Automobile Insurance Co.* v. *Fidelity and Casualty Company of New York*, 159 Md. 631, 152 Atl. 523, 526.

Johnston's failure to cooperate with appellee consists not only in his lack of veracity but in his active cooperation with the attorney Farabi. Voluntary submission to process, even though collusive, may not prejudice the defense of litigation to such extent as to amount to a violation of the cooperation clause as where substituted or other service may bring the parties before the same court, *Marcum* v. *State Automobile Mutual Insurance Co.*, 134 W. Va. 144, 59 S.E. 2d 433. And the legal consequences of collusive service may be waived by the company, *Ohio Casualty Insurance Co.* v. *Beckwith*, (5 Cir.) 74 F. 2d 75. But where collusive service to which the insured would not otherwise be amenable is combined with outright falsehood, the combination certainly does not spell out co-operation, *Ems* v. *Continental Automobile Insurance Assn.*, (Mo. App.) 284 S.W. 824; *Buckner* v. *Buckner*, 207 Wis. 303, 241 N.W. 342; *Metropolitan Casualty Co.* v. *Richardson*, (D.C.S.D. Ill.) 81 F. Supp. 310.

Appellants assert however that Kansas law, the interpretation of which must govern this case, is not in accord with the foregoing, citing *Jameson* v. *Farmers Mutual Automobile Ins. Co., Inc.*, 181 Kan. 100, 309 P. 2d 394. In that case the Supreme Court of Kansas held that an insurer cannot disclaim liability under a claim of lack of cooperation by the insured from their inability to locate the policy holder before trial unless substantial and actual prejudice in defending the action is shown. In so holding Kansas follows a line of cases dealing with the voluntary disappearance of the insured prior to trial as an exception to the general principles established in this field. See Appleman, Insurance Law and Practice, sec. 4784, pp. 182, 183, and cases cited in notes 39, 40, 41, 42, and 43. Because of the fact that the insured's unavailability as a witness if viewed as a breach of the cooperation clause would offer temptation to the insurer to spirit him beyond the jurisdiction of the court, these cases have sought to prevent such a result by placing the burden upon the insurer to show that its case was adversely affected by his disappearance.

These cases do not affect the established doctrine that the cooperation cause will be deemed to be violated if the insured by collusive conduct appears to be assisting the claimant in the maintenance of his suit rather than the insurer. See *Bagley* v. *Lumbermens Mutual Casualty Co.*, 99 Colo. 300, 62 P. 2d 469; *Buckner* v. *Buckner*, *supra*; *Storer* v. *Ocean Accident & Guarantee Corp.*, (6 Cir.) 80 F. 2d 470; *State Automobile Mutual Ins. Co.* v. *York*, *supra*; *State Farm Mutual Automobile Ins. Co.* v. *Bonacci*, *supra*.

Affirmed.

Number 5590.

Pickett, Circuit Judge, Dissenting.

The insurance policy in question here provides that "The Insured shall cooperate with the Company and, upon

Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. * * *" No claim is made that the insured failed to perform any of the requirements enumerated in the foregoing clause. Although the provisions of the policy do not prohibit the insured from accepting service in any jurisdiction, the trial court held that the insurance company was relieved of liability only because of the manner in which service of process was obtained in a jurisdiction in which the insured did not reside. Granting that the service of process in Missouri was collusive, I find nothing in the record which would sustain a finding that the insured's conduct in arranging to be served in Missouri was a fraud upon the insurance company, that it violated any provisions of the policy, or that it was material or prejudicial in any way to the defense of the actions. There is no hint that the insured refused to cooperate in defending the actions. The insured did not know the injured parties, and the desire to have the cases tried in a jurisdiction other than that of his residence was personal. The same is true as to the action brought in a Kansas county adjoining the one in which the insured resided. Neither of these cases was tried, and the action is now pending in the county in which the insured resides, where the insurance company is free to present any available defense. So far as the record discloses, the insured has complied with the cooperation clause of the policy in this pending suit.

The causes of action were transitory in nature, and such actions could be maintained at any place where service could be obtained upon the insured. *Elliott* v. *Johnston*, ... Mo. ....., 292 S.W. 2d 589. This is true even though the defense is more costly and inconvenient. *Bavuso* v.

Angwin et al., 166 Kan. 469, 201 P. 2d 1057. If service upon the insured had been valid in a jurisdiction other than that of his residence, it would have been necessary for the insurance company to defend the actions. The Missouri Circuit Court held that service was had in Missouri as a result of a conspiracy between the attorney for the injured parties and the insured, which amounted to a fraud upon the Missouri courts. But, the Supreme Court of Missouri affirmed the decision not because of collusion or fraud upon the court, but upon the right to apply the doctrine of forum non conveniens in transitory actions without statutory authority. *Elliott v. Johnston, supra.* The court said: "* * * there was no fraud in its true meaning in the filing of the suits in Vernon County and the procurement of the service of process." It was further stated that "The plaintiffs had existing claims against Johnston 'under the law of another state' and could therefore institute their actions in Missouri, providing they were able to obtain service of process upon the defendant. * * * 'It is not a fraud to do what the law permits', * * *." The effect of the decision, I think, is that there was nothing wrong in bringing the actions and accepting service in Missouri. The court said: "So, there was appropriate venue and personal service of process and the Circuit Court of Vernon County had jurisdiction of the parties and the subject matter and consequently of the actions * * *." The case is now pending where the insurance company says it should have been brought in the first instance, with no showing that the activities in Missouri injured or prejudiced it in any way.

The trial court concluded as a matter of law, that the cooperation clause was violated when the insured conspired with the injured parties to subject himself to service of summons in Missouri and in Crawford County, Kansas, and by giving the insurance company's representative false

and misleading information in connection with the service.[1] We held in *State Farm Mutual Automobile Ins. Co.* v. *Koval*, 146 F. 2d 118, that "Under the weight of authority, to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer; whether there has been such a breach is a question of fact; and such a breach is an affirmative defense, the burden of establishing which rests on the insurer." See also *State Farm Mut. Auto. Ins. Co.* v. *Palmer*, 9 Cir., 237 F. 2d 887; *Standard Accident Ins. Co. of Detroit, Mich.*, v. *Winget*, 9 Cir., 197 F. 2d 97; 29 Am. Jur., Ins., § 789; Blashfield's Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 6, Part 2, § 4059, pp. 78-81. Considering the entire record, and all the possible results from the conduct of the insured, I am of the view that there is no substantial evidence which shows that the insurance company has been prejudiced in any way. The case is now ready for trial in the county where apparently the insurance company thinks it should be tried. Unless the insured fails to cooperate in the defense of that action, as required by the policy, there is no reason why the insurance company should be relieved of its obligation under the policy because the insured and the attorney for the injured parties colluded to have the action tried in another jurisdiction, which collusion had no effect upon the defense to the actions. The end result is that the insurance company got what it wanted. I would reverse the judgment.

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[1]The so-called "pack of lies" of the insured related only to the reasons for agreeing to submit to service of process away from his residence. They had nothing to do with the defense to the actions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 824

BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, A MINOR, AND MARY ANN ELLIOTT, A MINOR,

Petitioners,

vs.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, A CORPORATION, AND FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

The petition and brief filed by petitioners disclose no matter or ground justifying further review by this Court of the decision of the United States Court of Appeals for the Tenth Circuit. The decision of the Court of Appeals

was not in error, and was not in conflict with the decisions of the Court of Appeals of the other Circuits, nor in conflict with its own prior decisions on the matter; the decision was not in conflict with the applicable law of the State of Kansas. Further, it appears that the gravamen of petitioners' request for further review is merely the unsupported claim that the judgment below was not supported by sufficient evidence, a ground upon which further review is seldom granted by this Court.

It is also clear that there is no federal question, or question of public importance involved here, the issues being confined solely to the controversy between the parties, involving a set of circumstances not likely to be repeated.

None of the grounds asserted by petitioners are documented by any decisions supporting petitioners' contentions.

The Question Presented.

The petitioners, either by inadvertence or by zeal of partisanship, have not fairly presented the question submitted for review. Petitioners' statement (Pet. p. 3) that the majority opinion below "held in effect that there was no necessity of a showing of prejudice by the insurance companies in order to avoid their policy obligations" is not correct, and is grossly misleading. The record completely refutes such statement. The Court of Appeals did *not* eliminate the necessity of a showing of prejudice by the insurer, but, on the contrary, affirmed a final judgment which contained the following specific findings of fact (Rec. pp. 74, 75):

> "13. The defendant Herman E. Johnston breached and violated his agreement to cooperate with his insurers, the plaintiffs herein, as required under the terms and provisions of the policy of insurance No.

MF-144 involved herein, (a) by voluntarily subjecting himself to service of summons in four actions brought by the Elliott defendants against him in the Circuit Court of Vernon County, Missouri, as the result of collusion with Pete Farabi, the attorney for the Elliott defendants; (b) by voluntariiy subjecting himself to service of summons in actions brought by two of the Elliott defendants against him in Crawford County, Kansas as the result of collusion with Pete Farabi, the attorney for the Elliott defendants; and (c) by giving plaintiffs' investigator false and misleading information in connection with his efforts to ascertain the facts pertaining to the service of summons, and not cooperating with him and plaintiff insurance companies in preparing the cases ready for trial.

14. *Such breaches by Herman E. Johnston of the cooperation clause of the policy involved here were of such gravity as to prejudice the plaintiff insurers*, and when the cooperation condition was broken, the policy and all of its benefits were at an end, at the election of plaintiffs, and plaintiffs did so elect.

15. By reason of such wilful and material breaches of the cooperation clause of the insurance policy involved herein, the defendant Herman E. Johnston has forfeited his right to all or any of the benefits afforded by Policy No. MF-144 issued by the plaintiffs to the defendant Anna Mae Johnston, under which said policy the defendant Herman E. Johnston was an additional insured, including any right of defense to the present actions pending in the District Court of Bourbon County, Kansas, and any right to indemnity by plaintiffs in the event judgments are entered against him in all or any of such actions, and that it is just, equitable and proper that a Final Decree be entered herein granting to the plaintiffs the relief sought in their Complaint for Declaratory Judgment herein." (Emphasis supplied.)

Petitioners (and, indeed, Circuit Judge Pickett, who wrote the dissenting opinion below) have ignored these specific findings of fact. The majority opinion below stands as a

decision squarely in line with the prevailing weight of authority in the Courts of Appeals and elsewhere, holding that where an insured's conduct amounts to a material breach of the cooperation clause, resulting in prejudice to the insurer, the insurer is exonerated. Thus, when the decision below is discerned in its true light, and free from petitioners' distortion, there is no justification for petitioners' erroneous statement of the question presented.

In light of a full understanding of the opinion below, petitioners' theory collapses, and even any pretense of a ground for further review vanishes.

Statement of the Case.

As disclosed by the record below, both the trial court and the Court of Appeals were confronted with a sordid story of collusion between an insured and counsel for the injured parties. The collusion not only involved a ready willingness on the part of Johnston to aid and abet the cause of the Elliotts in voluntarily submitting himself, by prearrangement with the Elliotts' counsel, to service of process in actions commenced in Missouri, a state to which Johnston was not amenable to service of process, but such devious strategem was again employed later, in a county of Kansas to which Johnston was not amenable to service of process; in addition, Johnston freely admitted that he had given false and misleading information to the representatives of the insurance companies concerning the mode and manner of service of process, and *brazenly admitted that all of such information was a "pack of lies"*. (Rec. 41; Op. App. A. 3.)

Johnston's conduct manifested monumental disregard of his contractual obligations and a pattern of irresponsibility which flaunted the very heart and purpose of the cooperation clause in the policies. As said in *Home Indemnity Co. v. Standard Accident Ins. Co.*, 167 F. 2d 919, 924: "Truth-

fulness seems to be the keystone of the cooperation arch." As shown by the undisputed record below, Johnston showed an utter contempt for truthfulness; he was guilty of the very evils which the cooperation clause was intended to prevent.

While, as pointed out above, the Court of Appeals affirmed a judgment which expressly found that Johnston's conduct had prejudiced the respondent insurance companies, a circumstance which petitioners have studiously avoided here, further serious inaccuracies and omissions in petitioners' statement of the case necessitate correction here. Petitioners say (Pet. p. 7):

> "* * * Mr. Farabi went to Herman Johnston's home and asked Johnston if he wanted to be tried in Kansas or Missouri, to which Johnston replied he would rather be tried in Missouri. * * *
>
> "Mr. Farabi did not suggest to Johnston that he (Farabi) would like to have the case tried in Missouri. * * *"

Such statements by petitioners here are not true, for the record below discloses, without dispute, that the desire to commence the actions in Missouri originated with Farabi, not Johnston, as shown by Farabi's own testimony (Rec. pp. 66, 67):

> "I just told him I represented the plaintiffs and I was going to sue him and just asked him if he ever had occasion to go to Missouri and he said he did; he said he went over there occasionally; *I said I could sue you here but I would like to sue you over there* * * *."
>
> * * * * *
>
> "*I told him I would rather sue him in Missouri than in Bourbon County, Kansas* but didn't tell him the reason. * * * Because of some unhappy experiences I have had in Bourbon County is all. * * *" (Emphasis supplied.)

Farabi's conversation was fully corroborated by Johnston's testimony, for Johnston testified (Rec. p. 31):

> "* * * I didn't know why he would like to have it tried over there but it was agreeable with me. * * *"

It is apparent that petitioners here are attempting to create a climate in which it appears that Johnston, not Farabi, was responsible for having the original injury actions commenced in Missouri, rather than in Kansas. However, as shown by the testimony of both Farabi and Johnston, Farabi, and not Johnston, planted the seed which resulted in Johnston's collusive conduct, a circumstance which, when measured by justice, amply supports the result reached below.

ARGUMENT.

I.

The majority opinion below, affirming a judgment exonerating the insurer, which specifically found that the insured was guilty of material breaches of the cooperation clause which prejudiced the insurer, was not in conflict with (a) prior decisions of the same court, or (b) decisions of other Courts of Appeals, or (c) decisions of the Kansas courts, but was squarely in accord with all controlling law.

The result reached in the majority opinion below was not in conflict with prior decisions of the Court of Appeals, Tenth Circuit, nor with the decisions of the other Courts of Appeals. Since the trial court below specifically found that Johnston's conduct in fact prejudiced the respondent insurance companies, it is elementary that such findings of fact will not be disturbed unless clearly erroneous. Certainly, on the record here, it cannot be said that the finding was other than in accord with the facts. That Johnston's conduct amounted to both a material and prejudicial breach of the cooperation clause is clear from the record below. If the Elliotts' original suits in Missouri had been allowed to proceed, Johnston would have been compelled to face trial in Missouri under conditions patently resulting in advantage to the Elliotts with corresponding prejudice and disadvantage to Johnston and the respondent insurance companies. A verdict finding Johnston negligent could have been returned by a vote of nine out of twelve Missouri jurors, instead of the unanimous verdict required in Kansas; it was a matter of judicial knowledge that Kansas witnesses could not have been compelled to

appear in Missouri, thus requiring, at best, deposition procedure in Kansas, with additional expense and the loss of "face-to-face" testimony from such Kansas witnesses; the insurers would have had to employ Missouri counsel who would have had to travel to Kansas to investigate the case; if Kansas witnesses were to be brought to Missouri for the trial, additional travel and living expense for such witnesses would have been suffered by the insurers. Further, even as recognized by the Supreme Court of Missouri, Farabi's preference for Missouri courts may have been influenced by the "reputed largesse" of Missouri juries, as compared with Kansas juries. (See *Elliott* v. *Johnston* (Mo.) 292 S. W. 2d 589, 594; and *Metropolitan Casualty Co. of N. Y.* v. *Johnston*, 146 Fed. Supp. 5, 8.)

Further, the conclusion is inescapable that, since the Elliotts, acting through Farabi, deemed it to their advantage to commence the original actions in Missouri, and to procure Johnston's collusive submission to service of process there, as a natural concomitant thereto, and *as a matter of law*, some consequent prejudice and disadvantage necessarily had to be suffered by Johnston and the insurers. As shown by the record below (Rec. p. 20), the Circuit Court of Vernon County, Missouri, in quashing service of process in the six Elliott actions specifically found "that plaintiffs' Attorney Farabi, and defendant Johnston, wrongfully and fraudulently conspired and colluded together to invoke the processes of this Court and its writ of summons caused to be issued in this action by fraudulent acts of plaintiffs' attorney and defendant." As pointed out in the majority opinion below (Op. A. 3) the result reached by the trial court in Missouri was affirmed on appeal to the Supreme Court of Missouri (*Elliott* v. *Johnston* (Mo.) 292 S. W. 2d 589).

When the Elliotts were thus deprived of the fruits of

their collusion, or, to put it colloquially, recognized that "they could not get away with the trick," they persisted in their efforts to prosecute their actions in an environment holding some further advantage to them and further detriment to Johnston and the insurers, and filed a second series of actions in Crawford County, Kansas; again, by prearrangement between Farabi and Johnston, Johnston was persuaded to come into Crawford County to accept service of summons. Only when the second attempt to serve their advantage failed, did the Elliotts commence a third series of actions in Bourbon County, Kansas, where Johnston did, in fact, reside. However, as measured by the rule long prior announced by the Court of Appeals for the Tenth Circuit in *United States Fidelity and Guaranty Co.* v. *Wyer*, 60 F. 2d 856, cert. den. 287 U. S. 647, 77 L. Ed. 560, when Johnston first aided and abetted the Elliotts' cause in Missouri the cooperation clause was then and there irrevocably breached by Johnston, and the policies were at an end, if the insurers so elected. In the *Wyer* case the Court followed the sound reasoning announced earlier by Judge Cardozo in *Coleman* v. *New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367. The trial court, in entering the judgment below, simply followed the ruling in the *Wyer* case (see *Metropolitan Casualty Insurance Company* v. *Johnston*, 146 Fed. Supp. 5, 8). After Johnston had breached the cooperation clause in a material respect, the insurers had the right to end the contract, and no subsequent act, either on the part of the Elliotts or Johnston, could restore to Johnston the rights which he had forfeited. The law has little regard for belated attempts to restore a legal status quo when patently inspired by the fact that the wrongdoer has been caught "redhanded" in a nefarious scheme.

No conflict with other decisions of the Tenth Circuit.

Petitioners' plea here for further review, grounded upon the allegations that the majority opinion below was in conflict with prior decisions of the Court of Appeals, 10th Circuit, in conflict with decisions of other Courts of Appeals, and in conflict with Kansas case law, is wholly without merit. Petitioners cite no authority whatsoever supporting their several contentions. Inasmuch as the judgment entered by the trial court in the case here specifically found that Johnston's repeated breaches of the cooperation clause were of such gravity as to actually prejudice the respondent insurance companies, the decision of the Court of Appeals below certainly cannot be said to have been a decision at variance with prior decisions on the matter here involved. The implications sought to be drawn by petitioners are not justified by the record, nor by the majority opinion. Petitioners' studious avoidance of this aspect of the litigation is an unfair distortion of this case. The result reached in the majority opinion is in precise accordance with the prior decision of the Court of Appeals, 10th Circuit, in *United States Fidelity & Guaranty Co.* v. *Wyer*, 60 F. 2d 856, cert. den. 287 U. S. 647, 77 L. Ed. 560. There the Court considered the legal consequences of certain false information given to the insurer by one Willie Buffalo, the insured. An injured party, having already recovered a judgment against Buffalo, brought action directly against the insurer. The insurer defended on the ground that Buffalo had breached the cooperation clause. Judgment was entered by the trial court for the injured party, but the reviewing court reversed such judgment, and held that the cooperation clause was one of the conditions of the policy which, when breached by the insured, ended the contract at the election of the insurer. The decision clearly announces the rule

that cooperation is a condition precedent to liability on the part of the insurer. The majority opinion rendered here below followed the reasoning of the ruling in the *Wyer* case.

Moreover, the majority opinion here below was not at variance with *any* of the few decisions cited in the petition (Pet. p. 10). Apparently in support of their statement that the majority opinion below was in conflict with prior decisions of the Court of Appeals for the Tenth Circuit, petitioners rely only on *State Farm Mutual Automobile Ins. Co.* v. *Koval*, 146 F. 2d 118. The *Koval* opinion did no more than hold that an insured's failure to attend trial did not constitute a material breach of the cooperation clause of the policy, where, under the facts there involved, it was clear his absence did not prejudice the insurer, thus providing no ground for the insurer's exoneration. It plainly appeared in that case that even if the insured had been present he could not have given any material testimony on the issues with respect to the injuries and damage. The majority opinion here below, of course, is not at variance with the *Koval* decision. Manifestly, there is no merit to petitioners' claim that the decision here was in conflict with prior decisions of the Tenth Circuit.

No conflict with decisions of the Courts of Appeals of any other circuit.

Further, the majority opinion, here below, was not in conflict with decisions of any of the other United States Courts of Appeals, and quite patently not in conflict with the two decisions cited by petitioners (Pet. p. 10). Petitioners cite first "*Associated Indemnity Co.* v. *Davis*, C. C. A. N. C., 104 F. 2d 730", but *obviously this is an erroneous citation*, for the case reported at 104 F. 2d

730 is *State Automobile Mutual Ins. Co.* v. *York*. We have ascertained that *Associated Indemnity Co.* v. *Davis* is reported at 136 F. 2d 71. Whether petitioners intended to rely on the *Associated Indemnity* case or the *York* case is without materiality, for neither case is at variance with the majority opinion here. In the *York* case, the Court of Appeals for the Fourth Circuit, did no more than express the view that discrepancies in statements made by the insured must be made in bad faith and must be material in nature and prejudicial in effect. The trial court here below, on ample evidence, and upon admissions of Johnston himself found that Johnston's "pack of lies" was a material breach of the cooperation clause and prejudicial in effect.

Associated Indemnity Co. v. *Davis*, actually reported in 136 F. 2d 71, supplies no more support for petitioners than the *York* case. The *Associated Indemnity* decision merely held that, on the facts there presented, the acts of the insured who originally refused to consult with the insurer's attorney, but who later advised the insurer he was available for consultation and who actually did appear at the trial and testified, did not prejudice the insurer. The majority opinion here below was plainly not contrary to such decision.

Nor was the majority opinion here below in conflict with *Norwich Union Indemnity Co.* v. *Haas*, 179 F. 2d 827 (Seventh Circuit), where the facts disclosed that the circumstances surrounding a misrepresentation by the insured did not prejudice the insurers. Moreover, it was made clear there that in any event, the insurer was held to its obligation because *it had waived the breach, if any, of the cooperation clause by the insured* (179 F. 2d l.c. 831, 832).

No conflict with decisions of the State of Kansas.

Similarly, there is no merit to petitioners' claim that the decision below was at variance with prior decisions of the Supreme Court of the State of Kansas. To support their contention in this regard, petitioners again cite but one case (Pet. pp. 10, 11), *Jameson* v. *Farmers Mutual Automobile Ins. Co.*, 181 Kan. 100, 309 P. 2d 394. Examination of that single decision discloses that the insurer was denied exoneration only because the court there rejected the insurer's contention that the insured had not given timely notice of the accident (309 P. 2d l. c. 399), *an issue not involved here*. The question of lack of cooperation by the insured was not really involved, and indeed, was not seriously argued by the insurer. This is clear from the opinion, where it is said, 309 P. 2d 400:

> "This brings us to the question of failure of cooperation on the part of the insured, *which is hinted by appellee (the insurer) but not strenuously urged.* • • •" (Emphasis and parenthetical explanation supplied.)

Moreover, even the "hint" of lack of cooperation involved only the question of whether the insurer could disclaim liability under claim of lack of cooperation by the insured, based on their inability to locate the policyholder before trial; the case did not involve the question of *affirmative conduct on the part of the insured* constituting a material breach of the cooperation clause. Obviously the *Jameson* case is without application to the issues involved here, and may not even remotely be regarded as a decision at variance with the majority opinion here. Indeed, it is clear from the *Jameson* opinion that Kansas will not permit an insurance company to be "filched" by affirmative conduct by an insured violative of the cooperation clause, for the Supreme Court of Kansas said, 309 P. 2d l. c. 400:

> "• • • Such is the only proper rule in order to avoid conspiracy between an insured and an injured person to filch the coffers of an insurance company, • • •."

Both the trial court and the Court of Appeals here below were confronted with repeated affirmative acts on the part of Johnston, in active collusion with the Elliotts or the Elliotts' counsel, plainly intended to aid and abet the Elliotts' cause, with inescapable prejudice and detriment to the respondent insurance companies.

In the course of the opinion of the trial court below (*Metropolitan Casualty Ins. Co. of N. Y.* v. *Johnston*, 146 F. Supp. 5), the trial judge said, p. 8:

> "This court is inclined to take essentially the same view of the admitted facts as that taken by the Missouri court. • • • •"

In so ruling, the trial judge was referring to findings made by the Circuit Court of Vernon County, Missouri, which latter court, when it sustained the motions to quash service of summons on Johnston in the six actions brought there by the Elliotts, said, in a memorandum opinion (Rec. 20, 72):

> "4. The court further finds that plaintiffs' Attorney Farabi, and defendant Johnston wrongfully and fraudulently conspired and colluded together to invoke the processes of this court and its writ of summons caused to be issued in this action by fraudulent acts of plaintiffs' attorney and defendant."

As the trial judge further pointed out in his opinion (146 Fed. Supp. 5, 8):

> "• • • *That there was a failure of the insured to cooperate with his insurers, which was of such gravity as to prejudice them, seems clear.* • • • •" (Emphasis supplied.)

It thus appears that petitioners' argument that the majority opinion here below was contrary to the applicable law of Kansas is as empty of merit as their claim that the decision was contrary to prior decisions of the Court of Appeals, 10th Circuit.

Examination of the remaining cases cited by petitioners (Pet. p. 10) upon abstract propositions of law, including decisions from the state courts of Oregon and Louisiana which manifestly have no materiality to the issues here, demonstrates conclusively the utter poverty of petitioners' position here.

II.

Since it has been demonstrated that the majority opinion below is not in conflict with any other decisions, it is apparent that in reality petitioners seek review of the decision below because they feel that the findings of the trial court which were approved by the reviewing court, were not supported by substantial evidence. It has been the consistent policy of this Court that certiorari will rarely be granted to review non-federal questions involving only the sufficiency of the evidence.

Petitioners' plea for further review of the decision below, in reality, rests upon a charge that the evidence did not support the findings of the trial court. It has been the consistent policy of this Court to deny application for certiorari when the sole question pertains to sufficiency of evidence in the trial court. As said in *United States* v. *Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926:

> "We do not grant a certiorari to review evidence and discuss specific facts."

This view was also recently announced in the separate opinion of Mr. Justice Frankfurter in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 537, 1 L. Ed. 2d 515, 527.

This principle was also followed by this Court in *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849.

III.

The record amply discloses that the result reached below was in accord with substantial justice.

The petitioners urge that further review of the decision below is necessary in order that substantial justice be accorded to the Elliotts. We respectfully submit that, on the undisputed record of repeated collusion between Johnston and Farabi, counsel for the Elliotts, who necessarily must bear the consequences of the acts of Farabi, their counsel, who represented them not only throughout the litigation below, but even here on their petition, it is clear, beyond any doubt that the loss of Johnston's rights under the insurance policy is in accord with every concept of justice.

The Court of Appeals below said (Op. A. 5, 6):

> "There can be no doubt that in the instant case Johnston's admitted "pack of lies" concerning his submission to Missouri process was both intended to mislead the appellee company and to further and aid his collusive understanding with the claimants' counsel. He had consulted with opposing counsel, agreed to lend himself to that attorney's desires, did so, and then falsely testified concerning the arrangement in order to hide the collusion. * * *"
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> * * * * *
>
> "Johnston's failure to cooperate with appellee consists not only in his lack of veracity, but in his active

> cooperation with the attorney Farabi. * * * But where collusive service to which the insured would not otherwise be amenable is combined with outright falsehood, the combination certainly does not spell out cooperation."

A plea for "substantial justice" mouthed by those who were *twice* judicially found to be guilty of dishonest and collusive conduct, paradoxically urges that this Court forsake the very foundations of justice. Such a plea demonstrates only an implicit contempt for the just processes of the law. Such plea should not evoke sympathy, but only astonishment for the brashness of such request.

We take issue with the statement of petitioners (Pet. p. 10) that the policy of insurance does not forbid the insured from "so maneuvering as to secure a trial in a venue of his choice." Petitioners cite no authority in support of this statement. In direct refutation of such statement is the sound reasoning of Judge Mellott, the trial judge below, found in his opinion (*Metropolitan Casualty Ins. Co., of N. Y.* v. *Johnston*, 146 F. Supp. 5, 8):

> "* * * Nor is the argument to the effect that the insurers suffered no prejudice from being required to go into other jurisdictions to defend the suits sound. It misconceives the effect of the failure of the insured to cooperate with the insurers as specified in the contract. *They were charged with the responsibility of defending the insured. They, rather than he, had the right to determine whether it was advantageous to try such actions as might be instituted against him in the court of his domicile or in some other.* They also had the right to expect of him absolute truthfulness—'the keystone of the cooperation arch'." (Emphasis supplied.)

As shown by the record here, Johnston, by his own admissions, has established that his whole pattern of con-

duct was deliberately intended to aid the Elliotts in prosecuting their several actions in one or another jurisdiction regarded as favorable to the Elliotts. *That which was favorable to the Elliotts necessarily was prejudicial to Johnston and to the respondent insurance companies.* There could be no clearer violation of the cooperation clause than the repeated collusive acts by Johnston acting in concert with Farabi, Elliotts' counsel. Indeed, the Court of Appeals for the Tenth Circuit in *Buffalo* v. *United States Fidelity & Guaranty Co.*, 84 F. 2d 883, in speaking of the delinquent insured there, said, p. 885:

> "• • • *Nothing is more dangerous than a client (an insured) who deliberately falsifies the facts.* • • •"
> (Emphasis and parenthetical explanation supplied.)

The excuses offered by petitioners here for Johnston's conduct are vacuous, coming, as they do, *after* Johnston's collusion was discovered and rendered fruitless. To give a sympathetic ear to such empty excuses would, in reality, reward dishonest dealings, and would plainly defeat the purpose of the cooperation clause, which clause is described in 5 American Jurisprudence (Automobiles), § 545, p. 810:

> "• • • A clause of this character is a perfectly reasonable one framed with the object of protecting the insurance company against the risk of collusion between the assured and persons claiming damages for alleged torts, and is a material condition of the policy, the violation of which by the assured forfeits his right to claim indemnity under the policy. • • •"

As said in *Kindervater* v. *Motorists Casualty Ins. Co.*, 120 N. J. L. 373, 199 Atl. 606, 608, a decision which, while not controlling here, nevertheless is one which illuminates the importance of the cooperation clause:

> "The design of the provision in question was not only to obviate the risk of a covinous or collusive combination between the assured and the injured third

party, but also to restrain the assured from voluntary action materially prejudicial to the insurer's contractual rights, *especially in the exercise of its exclusive function to defend claims made under the policy.* * * *" (Emphasis supplied.)

* * * * *

"The terms of the contract, as understood by a person of reasonable intelligence, measure the insurer's obligation; and there can be no recovery, in the absence of the elements of estoppel or waiver, where the assured has breached in matters of substance a reasonable protective provision made the determinative of liability. This regulation of the assured's conduct is essentially reasonable. *Without these protective provisions, the insurer would be at the mercy of dishonest and culpably indifferent policy holders, for thereby it would run the risk of impoverishment to the detriment of honest claimants. Neither the public nor private interest is served by laxity in this regard.*" (Emphasis supplied.)

By his own admission, Johnston, the man upon whose rights the Elliotts depend, is shown to be "a dishonest and culpably indifferent insured."

Apt and persuasive reasoning demonstrating the inherent justice in the loss of rights under a policy because of immoral and dishonest acts on the part of the policyholder is found in *Chaachou* v. *American Central Ins. Co.*, 241 F. 2d 889, a decision of the Court of Appeals, 5th Circuit, rendered in 1957. While the *Chaachou* case did not involve the cooperation clause of an automobile insurance policy, it nevertheless provides sound reasoning having equal application to the issues here involved. Judgment was rendered below for the insurer there and affirmed by the Court of Appeals, which, in its opinion, said (241 F. 2d 889, 892):

"We think that, as against this attack, the Court's charge was eminently correct. We start, first, with a

contract which, plain in its terms, cannot be ignored by invoking the principle which deplores forfeitures, *Fidelity-Phenix Fire Insurance Co.* v. *Benedict Coal Corporation*, 4 Cir., 64 F. 2d 347, cert. den. 289 U. S. 762, 77 L. Ed. 1505, or construes policies most strongly against the insurer in favor of the assured, *Palatine Insurance Company* v. *Whitfield*, Sup. Ct. Fla., 73 Fla. 716, 74 So. 869. Thus the agreement of the parties called precisely for honesty and fair dealing by the assured and unless there be a public policy against people contracting to be honest and refraining from wilful false swearing and misrepresentation, it is a contract which, as any other, ought to be enforced. Taking our *Erie* lights, as best we can, *Meredith* v. *Winter Haven*, 320 U. S. 228, 238, 88 L. Ed. 9, 15, Florida, whose policy controls here, recognizes this, we think, as a valid area for contract. *American Insurance Company of Newark, New Jersey* v. *Robinson*, 120 Fla. 674, 163 So. 17, see *Hartford Fire Insurance Co.* v. *Haggar*, 5 Cir., 196 F. 2d 270.

"The contract does not spell out that it is only false swearing, misrepresentation, concealment or fraud which is successful that avoids the policy. Nor is there any reason why any such conditions should be read into it. *Clearly, in the absence of a statute, the law, which is founded on truth and justice, will not regard it as unsound that a person has lost the benefit of the contract by wilful, immoral, dishonest acts which the contract itself condemns.*

"Moreover, if the law out of some misgivings about forfeitures, were to require that the insurer demonstrate that it had been misled to its prejudice by the fraud, the policy provision would both be virtually worthless and put a premium on dishonest dealings by the assured. For if, by its own investigation, inspired perhaps by suspicions of the assured's efforts to misrepresent, the insurer satisfied itself that a fraud had been attempted and declined to pay, such a rule would mean that the assured's claim would then stand as though no dishonest acts whatsoever had been practiced. The mendacious assured, surveying the

possibilities and contemplating prospective tactics and strategy in the handling of his claim, would sense immediately that *vis-a-vis* himself and the underwriter, there would be no risk at all in his deceit. If it worked, he would have his money and, at worst, could be compelled to disgorge only by affirmative suit by the insurer if the fraud were discovered in time to be legally or practicably effective. If it didn't work—if, before consummation, fraud was detected—he would suffer no disadvantage whatsoever. It would be an everything-to-win, nothing-to-lose proposition.

"Additionally, such a rule would cast the underwriter in a role for which it is unsuited and in a process which the general good, out of long experience, considers best performed by government machinery. Convinced, as here by its own investigation of the claim, of dishonest acts by the assured, it would then have to undertake the task of segregating truth from untruth, ferreting out the honest from the dishonest, choosing the right from amongst the wrong with all or much of the factual material coming from one now considered to be morally unreliable.

"*The public interest is not furthered by these likely consequences of reading into the contractual language this burden nowhere expressed. A judge-made policy which thus gives advantage to dishonesty will retard, not accelerate, the orderly adjustment of insurance losses.* If the insurer, from the strong language of the contract interpreted in equally plain terms by the law, is entitled to assume that the assured is dealing honestly and fairly, asserting only that which in good faith is believed to be the substantial truth of the matter, the claim can be handled in a spirit and atmosphere of confidence. If, on the other hand, the insurer must realize that fraud is significant only if it is finally successful, that the slate is wiped clean if its own investigation uncovers the assured's cozening, the setting may then become one of hostile antagonism, reluctance and apprehension forcing more, not less, litigation.

"*Courts have long recognized that, 'The moral haz-*

ard is one of the main elements, if not the chief element, of an insurance risk, and it is never negligible. It is always material to the risk', Connecticut Fire Ins. Co. v. *Manning*, 8 Cir., 160 Fed. 382, 385. *It reflects the assumption that the relationship created by the contract is one requiring the utmost of honest, good faith dealing. Globe & Rutgers Fire Ins. Co.* v. *Stallard*, 4 Cir., 68 F. 2d 237, 240. *This clause then is but means of demanding, at a critical time, moral uprightness and conduct of the kind basic to the genesis of the undertaking.*" (Emphasis supplied.)

The result reached here below accords with substantial justice. If rights have been lost, it is only because Farabi chose to further his clients' advantage by procuring Johnston's willing complicity in collusive and dishonest acts not tolerated by the law. The loss of rights under such circumstances can hardly be attributed to a failure of justice. On the contrary, it is an example of law and justice being accorded their due dignity.

Conclusion.

It is respectfully submitted that the petitioners have demonstrated no ground justifying further review of the decision rendered by the Court of Appeals, 10th Circuit, below. For the reasons assigned above, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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